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# CRIMINAL LAW

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## THE CRIMINAL LAW PRACTITIONER'S DILEMMA: WHAT SHOULD THE LAWYER DO WHEN HIS CLIENT INTENDS TO TESTIFY FALSELY?\*

KENNETH REICHSTEIN†

The lawyer, specifically the criminal law practitioner, is faced with many role dilemmas<sup>1</sup> created by the conflicting normative commands of his profession. Where the client has confessed to his attorney, yet intends to take the stand to deny his guilt,<sup>2</sup> the attorney's dual roles as the advocate of his client's position in an adversary system of justice and as an officer of the court come into conflict. This study examines the diverse resolutions of this role conflict, suggested by various members of the legal community. In addition, it discusses the reaction to the dilemma by a selected geographic segment of the profession.

The current controversy<sup>3</sup> was initiated by Mon-

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<sup>1</sup> Parsons, *A Sociologist Views the Legal Profession*, in CONFERENCE ON THE PROFESSION OF LAW AND LEGAL EDUCATION 49 (1962).

<sup>2</sup> The reasoning of this paper is also helpful in dealing with situations where the client tells the attorney he intends to perjure himself in other ways than by admitting guilt.

<sup>3</sup> For many years the Bar has been divided on this problem. One wing believes that their first loyalty is to the client. Perhaps their best known spokesman is Charles P. Curtis. He wrote:

[The lawyer's] loyalty runs to his client. He has no other master. Not the court? you ask. . . . No, in a paradoxical way. The lawyer's official duty, required of him indeed by the court, is to devote himself to the client. The court comes second by court's, that is, the law's, own commandment.

Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

Members of the other wing consider themselves primarily officers of the court and favor strict construction of the Canons of Ethics. This view is expressed by Lloyd P. Stryker:

The standards of conduct the lawyers must obey are as high, and are as generally followed, as the

roe H. Freedman<sup>4</sup> in a paper presented to the Criminal Trial Institute of the District of Columbia Bar Association.<sup>5</sup> Professor Freedman argued that a lawyer is obligated to exploit every means to secure his client's acquittal and that a declaration by the defendant that he would perjure himself should not alter that obligation.<sup>6</sup> Freedman posited that the contrary position would raise constitutional problems<sup>7</sup> and would be inconsistent with certain policies underlying our legal system, namely the

maintenance of the adversary system, the presumption of innocence, the prosecution's burden to prove guilt beyond a reasonable doubt, the right to counsel and the obligation of confidentiality between the lawyer and client.<sup>8</sup>

Considering the lawyer's role as an officer of the court within the scope of the adversary proceeding,

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most exalted rules that govern any men on earth. All advocates are bound by these standards, and they must obey them. They may and should fight hard for their clients, but they must fight fairly. They may and should say all that honestly and honorably can be said for them. They may say it with fervor and all the persuasion in their power; but in saying it they may not deceive, they must not lie.

STRYKER, *THE ART OF ADVOCACY*, 283 (1954).

<sup>4</sup> Professor of Law, George Washington University; Co-Director, Criminal Trial Institute, Washington, D.C.

<sup>5</sup> Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

<sup>6</sup> *Id.* at 1482.

<sup>7</sup> *Id.* at 1477:

[The] client in such a case might well have grounds for appeal on the basis of deprivation of due process and denial of the right of counsel, since he will have been tried before, and sentenced by, a judge who has been informed of his . . . guilt by his own attorney.

<sup>8</sup> *Id.* at 1482.

Freedman said withdrawal from the case or informing the court of the defendant's intended perjury would only shift the ethical burden to another lawyer or to the judge.<sup>9</sup>

Therefore, the obligation of confidentiality, in the context of our adversary system, apparently allows the attorney no alternative to putting the perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either the judge or the jury.<sup>10</sup>

Such an analysis places the interests of the client above the attorney's obligations as an officer of the court.<sup>11</sup> In Freedman's conception of the function of a defense attorney, the client is truly treated as being innocent until the court finds him guilty, even when the client has admitted his guilt to his lawyer.<sup>12</sup>

Freedman's paper stimulated a series of rebuttals to his conception.<sup>13</sup> The most vehement of these,<sup>14</sup> by Mr. Chief Justice Warren Burger, who was then a judge on the Court of Appeals for the District of Columbia, urged a position that was diametrically opposed to Freedman's. Chief Justice Burger stated that

Canon 15 and Canon 37 of the American Bar Association are explicit and clear and it is sheer nonsense for anyone to claim that they leave doubt about the tendering of perjured testimony.<sup>15</sup>

<sup>9</sup> If the original attorney withdraws, the client will seek new counsel who will be faced with either the same dilemma or the prospect of a client who withholds relevant information. *Id.* at 1475-76.

<sup>10</sup> *Id.* at 1477-78.

<sup>11</sup> This is consistent with the views of Curtis. See note 3 *supra*.

<sup>12</sup> Freedman, *supra* note 5, at 1471.

<sup>13</sup> The author was also subjected to personal attack for his stand. Several judges complained to the Committee on Admissions and Grievances of the District Court of the District of Columbia, urging disciplinary action to be taken against Freedman. The furor resulted in a hearing, two meetings, a *de novo* review by eleven district court judges and a decision by the Committee to "proceed no further in the matter." *Id.* at 1469 n.1.

<sup>14</sup> Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11 (1966).

<sup>15</sup> ABA CANONS OF PROFESSIONAL ETHICS No. 15 (in part):

But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or

The Chief Justice did not shield his revulsion at the suggestion that an attorney should knowingly permit his client to perjure himself:

[t]he proposition that perjury may be ever knowingly used is as pernicious as the idea that counterfeit documents can be fabricated and knowingly offered to the court as genuine. This is so utterly absurd that one wonders why the subject need even be discussed among persons trained in the law.<sup>16</sup>

Chief Justice Burger articulated his conviction that the lawyer's duty to his client would never conflict with his duties to the court if these duties were properly understood.<sup>17</sup> The duty to the client must always be subservient to the attorney's primary obligations as an officer of the court.<sup>18</sup> Freedman, in contrast, reversed the priority of loyalties, placing the welfare of the client ahead of the court.<sup>19</sup>

It is possible, however, for the practicing attorney to avoid confronting this issue by resort to the epistemological argument that the attorney does not really "know" that his client will commit perjury.

[C]ounsel is not justified in introducing any evidence which he knows to be false. . . . But it frequently happens that testimony is offered which the counsel may suspect to be untrue but which he does not know to be false. In such event it is his duty . . . to present this testimony and leave it to the jury to determine its

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any manner of fraud or chicanery. He must obey his conscience and not that of his client.

ABA CANONS OF PROFESSIONAL ETHICS No. 37 states (in part):

It is the duty of a lawyer to preserve his client's confidences. . . . The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or to protect those against whom it is threatened.

Note that Canon 37 does not require the attorney to notify the court or law enforcement officials of his client's intent.

<sup>16</sup> Burger, *supra* note 14, at 12.

<sup>17</sup> Burger, *supra* note 14, at 16:

The noble aspects of our conception of criminal justice can be maintained without having every defense counsel envisage himself as a white knight in shining armor out to slay the fascist-minded prosecutors and their witnesses.

<sup>18</sup> This is in conformity with the views of Stryker. See *supra* note 3.

<sup>19</sup> See, p. 1 *supra*.

truth or falsity. The counsel has no right as such to pass upon the veracity of witnesses.<sup>20</sup>

In the situation under study, the defendant has told his lawyer that he has committed the act. But the lawyer does not "know" that his client has committed the act in the same sense that he would "know" if he had seen his client do it. The client may be mistaken, or he may be shielding someone.

Freedman was unwilling to avoid the issue by reference to the epistemological argument. He relied on Canon 37, as Mr. Chief Justice Burger had, and on Opinion 287 interpreting that canon:

[w]here the court is about to impose a sentence based on the misinformation that the defendant has no previous criminal record, if the attorney for the defendant learns of the previous record through his client's communication, he has no duty to correct the misinformation.<sup>21</sup>

Freedman argued from this that an attorney is not required to divulge his client's intention to perjure himself.<sup>22</sup>

He also realized that part of Canon 37 provides a basis for reaching the contrary conclusion:

[t]he announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to

<sup>20</sup> But see, Battle, *The Defense of a Client Whose Guilt is Known*, 4 N. Y. L. REV. 74, 75 (1926).

<sup>21</sup> ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1957). In this opinion, the Committee also held that Opinion 29 takes precedence over Opinions 155 and 156. Whereas Opinion 155 states that an attorney has a duty to disclose the whereabouts of a client who has jumped bail and Opinion 156 states an attorney is obligated to disclose a client's violation of probation condition, Opinion 29 states that an attorney should not reveal the confidences of a fugitive client who has forfeited bail.

In 1959 the Professional Ethics Committee held that the attorney for a defendant accused of armed robbery may not volunteer to the authorities information obtained from his client as to the whereabouts of the stolen goods, even though the stolen items consisted of approximately twenty handguns which may be on the verge of falling into the hands of persons who will use them for criminal purposes. But subsequent to the trial, according to the Committee, the attorney should advise his client to notify the authorities of the location of the guns, failing which the attorney should withdraw from further representation of the client. Unpublished opinion of the Chicago Bar Association (May, 1959).

<sup>22</sup> See p. 2 *supra*. Freedman's use of Opinion 287 to substantiate his position is not, however, highly persuasive. The situation with which that opinion is concerned does not involve the guilt or innocence of the defendant.

prevent the act or protect those against whom it is threatened.<sup>23</sup>

Thus, since perjury is a crime, it can be argued that Canon 37 does not bar disclosure of intended perjury. But Freedman contends that the crime of perjury within the case in which the lawyer is serving cannot logically be an exception to the obligation of confidentiality.<sup>24</sup> In addition, the provision "does not require disclosure but only permits it."<sup>25</sup>

Canon 15 also can be read to require disclosure of perjury. This canon states in part that

it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner or fraud or chicane. He must obey his own conscience and not that of his client.<sup>26</sup>

Freedman, however, maintains that Canon 15 is not applicable to the attorney who has made every effort to dissuade his client from testifying perjurally.<sup>27</sup> Unwillingly putting the perjuring witness on the stand is not proscribed by Canon 15.<sup>28</sup>

Finally, Canon 29 requires, *inter alia*, that counsel in a trial in which perjury has been committed inform the prosecuting authorities of the perjury.<sup>29</sup> Freedman construes this as only applying to witnesses of the opposing party.<sup>30</sup> Any other construction requiring disclosure of one's own client's perjury would violate the dictates of Canon 37.<sup>31</sup>

Other commentators have asserted that the Canons simply do not answer this question. James E. Starrs,<sup>32</sup> recognizing the impotence of the

<sup>23</sup> ABA CANNONS OF PROFESSIONAL ETHICS No. 37.

<sup>24</sup> Freedman, *supra* note 5, at 1478.

<sup>25</sup> *Id.*

<sup>26</sup> ABA CANNONS OF PROFESSIONAL ETHICS No. 15.

<sup>27</sup> Freedman, *supra* note 5, at 1478.

<sup>28</sup> See also ABA CANNONS OF PROFESSIONAL ETHICS 41 which requires in part that

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

<sup>29</sup> *Id.* 29.

<sup>30</sup> Freedman, *supra* note 5, at 1478.

<sup>31</sup> *Id.*

<sup>32</sup> Professor of Law, George Washington University Law School.

Canons,<sup>33</sup> has sought to resolve the dilemma by reference to his conception of the objectives of the criminal legal system.<sup>34</sup> He conceived the criminal trial not as a search for the truth,<sup>35</sup> but rather as the occasion for the prosecution to prove the defendant's guilt beyond a reasonable doubt.<sup>36</sup> This view leads to the conclusion that the confession of guilt by a client to his attorney should not affect the attorney in any manner because the adversary system considers this confession irrelevant to the court's adjudication of guilt or innocence.<sup>37</sup>

In a similar vein, Addison Bowman<sup>38</sup> has argued that the Canons<sup>39</sup> are inapplicable except as a general guide.<sup>40</sup> He stated that

the Canons of Ethics are so vague, so ambiguous, and so contradictory that they are of little or no help in resolving these problems, and that almost any position, on a given issue, can reasonably be defended with support from the Canons.<sup>41</sup>

While admitting that withdrawal from the case prior to trial would be an acceptable solution for the individual attorney,<sup>42</sup> Bowman emphasized

<sup>33</sup> Starrs referred to the Canons as "glittering generalities which . . . lack 'a body to kick and a soul to condemn.'" Starrs, *Professional Responsibility: Three Basic Propositions* 5 AM. CRIM. L.Q. 17, 20 (1966).

<sup>34</sup> Starrs, *Professional Responsibility: Three Basic Propositions*, 5 AM. CRIM. L.Q. 17 (1966).

<sup>35</sup> See Kent, *Legal Ethics*, 6 MICH. L. REV. 468, 474 (1908).

The chief business of the lawyer is that of counsel as to legal rights, and the maintenance, through the courts, of such rights. The lawyer offers himself as an expert as to the legal rights of all who ask his assistance and as to their enforcement. He is not an expert as to moral as distinguished from legal rights. He may know less of these than his client. There is, too, such a difference of opinion as to mere moral rights that, generally, they do not constitute a basis for advice.

<sup>36</sup> Starrs, *supra* note 28, at 21.

<sup>37</sup> WILLISTON, *LIFE AND LAW* 272 (1940).

The lawyer must decide when he takes a case whether it is a suitable one for him to undertake, and after this decision is made, he is not justified in turning against his client by exposing injurious evidence entrusted to him.

<sup>38</sup> Deputy Director of the Legal Aid Agency for the District of Columbia.

<sup>39</sup> ABA CANONS OF PROFESSIONAL ETHICS Nos. 5, 15, 29, 37, and 41.

<sup>40</sup> Bowman, *Standards of Conduct for Prosecution and Defense Personnel: An Attorney's Viewpoint*, 5 AM. CRIM. L.Q. 28, 28-29 (1966).

<sup>41</sup> *Id.* at 28.

<sup>42</sup> Withdrawal merely shifts the problem to another lawyer and leaves open the possibility that the defendant will perjure himself the next time without informing his counsel. Compare note 7 and note 9 *supra*.

that upon a court's refusal to grant such a request, the attorney should not present the defendant's testimony in a fashion that may lead the jury to conclude that counsel did not believe his client.<sup>43</sup>

Because of their diverse approaches, these commentators have widely differing practical reactions. All agree that the attorney should attempt to dissuade his client from perjuring himself.<sup>44</sup> The divergence of opinion commences if this course of action fails to change the client's mind. Although Chief Justice Burger does not explicitly state that the lawyer must inform the court of the intended perjury, he does place severe restrictions on the attorney's subsequent conduct. The lawyer may not "facilitate the perjury in any substantial degree."<sup>45</sup> In explanation of this admonition he states:

If in those circumstances the lawyer's immediate withdrawal from the case is either not feasible, or if the judge refuses to permit withdrawal, the lawyer's course is clear: *He may not engage in direct examination of his client to facilitate the known perjury.* He should confine himself to asking the witness to identify himself and to make a statement, but he cannot participate in the fraud by conventional direct examination.<sup>46</sup>

Chief Justice Burger also says, however, that the defense attorney must not suggest "in argument to the jury that the perjured testimony of his client is not the truth. . . ." <sup>47</sup>

David Bress concurs with the Chief Justice's

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The motion to withdraw may be unethical in this situation, leaving the attorney in a situation where, according to the often repeated proverb, "he is damned if he does and damned if he doesn't." Canon 44 provides that if the client,

. . . insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting of frivolous defenses . . . the lawyer may be warranted in withdrawing on *due notice* to the client allowing him time to employ another lawyer. (underscoring added).

While this Canon seems to conform to the dictate that the attorney should not be a party to his client's future crimes, set forth in Canon 37, the requirement of due notice creates a problem. Can due notice be properly given once the trial has begun without injuring the rights of the defendant? See note 7 *supra*.

<sup>43</sup> Bowman, *supra* note 40, at 30.

<sup>44</sup> Freedman *supra* note 4, at 1477. See also Bress, *Standards of Conduct of the Prosecution and Defense Function*, 5 AM. CRIM. L.Q. 23, 24 (1966).

<sup>45</sup> Burger, *supra* note 14, at 14.

<sup>46</sup> *Id.* at 13.

<sup>47</sup> *Id.* at 14.

position on the behavior of the attorney confronted with this problem. Bress states that the attorney

should move to withdraw from the case without revealing any confidences received from the client. If withdrawal is not permitted, then the defense counsel should limit his examination of the defendant who will give the perjured testimony to the simple question: "You have a statement to make to the court and jury—will you now make it." And he should not argue the truth of that statement in his argument to the jury, because to do so would be a fraud upon the court. He may, nevertheless, argue the case on the sufficiency of the government's testimony and the other evidence offered by the defense, exclusive of the defendant's own perjured testimony.<sup>48</sup>

Bowman would attempt to withdraw from the case first after being informed of his client's intended perjury and then immediately before trial.<sup>49</sup> If withdrawal attempts fail, Bowman states that the attorney should proceed with the defense of his client avoiding any conduct that might jeopardize the defendant's chances.<sup>50</sup>

Freedman, as noted, would attempt dissuasion. However, he considers withdrawal from the case as an improper course in that it only serves to shift the ethical problem to the judge or to another attorney.<sup>51</sup> The obligation of the attorney in the context of the adversary system is to allow the client to take the stand "without implicit or explicit disclosure of [his] knowledge to either the judge or the jury."<sup>52</sup>

In an attempt to deal with this problem many jurisdictions have adopted statutes, requiring the attorney to be truthful in his contacts with the court. Some of these laws proscribe deceit or fraud,<sup>53</sup> while others oblige attorneys to use truth-

ful means in advocating their client's causes.<sup>54</sup> In Federal practice, the United States Code makes knowing submission of perjured testimony a crime.<sup>55</sup> Absent a statute, the common law generally forbids knowing submission of false testimony by an attorney.<sup>56</sup> However, because these statutes and cases contain only very general rules, they, like the Canons, do not specifically deal with the perjury problem and offer no solution.

Although the issue has been primarily the concern of the legal community, the courts have occasionally been compelled to deal with it where an attorney has challenged his disbarment. In civil cases the knowing profference of perjured testimony is usually considered anathema to the judicial process.<sup>57</sup> However in the context of the criminal trial the courts have been reluctant to define the bounds of the attorney-client privilege. In *In Re Ryder*<sup>58</sup> an attorney concealed stolen money and a shotgun given to him by a client about to be arrested for bank robbery. It was

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with truth, and never to seek to mislead the judges or any judicial officer by an artifice or false statement of fact or law.

CAL. BUSINESS AND PROF. CODE, § 6068(a) (1954).

The ambiguity of such a broad prohibition is increased when the attorney is not positive his client is truthful in his admission of guilt. These statutes, like the canons, are not specific enough to deal with this problem and therefore are not conclusive of the issue.

<sup>48</sup> ALA. CODE RECOMP. tit. 46, § 50 (1958); ALAS. COMP. LAW ANN. § 32-103 (1939); CAL. BUS. AND PROF. CODE § 6068(d) (1962); MINN. STAT. ANN. § 481.06(4) (West, 1958); MISS. CODE ANN. § 8665(3) (1942); N. MEX. STAT. ANN. ch. 18, § 1-9(4) (1954); N.D. REV. CODE ch. 27, § 13-01(3) (1959); OKLA. STAT. ANN. tit. 5, § 3(3) (1966); ORE. COMP. LAWS ANN. § 15-101 (1940); WIS. STAT. tit. 24, § 256.29(1) (1959).

<sup>49</sup> See *supra* note 40. The vague admonitions of these statutes relate only to clear deceit upon the court and not to the closer issue presented by the perjury problem.

<sup>50</sup> 18 U.S.C. § 2 (1964).

<sup>51</sup> *Matter of Stein*, 1 N.J. 228, 62 A.2d, 801 (1949); *In re Spicu*, 126 F.2d 288 (6th Cir. 1942); *People ex rel. Colorado Bar Assoc. v. McCann*, 80 Colo. 220, 249 P. 1093 (1926); *In re O'Keefe*, 55 Mont. 200, 175 P. 593 (1918); *Townsend v. State Bar of Cal.*, 32 Cal. 2d 592, 197 P.2d 326 (1948); *Kingsland v. Dorsey*, 338 U. S. 318 (1949); *In re Cox*, 164 Kan. 160, 188 P.2d 652 (1948); *In re Obartuch*, 386 Ill. 323, 54 N.E.2d 470 (1944). *But cf. Matter of Gral*, 282 N.Y. 428, 26 N.E.2d 963 (1940); *Matter of Ellis*, 282 N.Y. 435, 26 N.E.2d 967 (1940).

<sup>52</sup> *In re Mendelson*, 135 N.Y.S. 438 (1912), an attorney was disbarred for allowing clients and witnesses to testify falsely as to insurance claims; *In re Davidson*, 223 N.Y.S.2d 579 (1962), held an attorney who allowed a couple to falsely testify they were South Carolina residents, for the purpose of obtaining a divorce in that state, should be disbarred.

<sup>53</sup> 381 F.2d 713 (4th Cir. 1967).

<sup>48</sup> Bress, *supra* note 44 at 24. See also, Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493 (1966).

<sup>49</sup> Bowman, *supra* note 40, at 22.

<sup>50</sup> *Id.* at 32.

<sup>51</sup> Freedman, *supra* note 5, at 1476.

<sup>52</sup> *Id.* at 1477-78.

<sup>53</sup> ALAS. COMP. LAWS ANN. § 35-2-71 (11) (1949); D.C. CODE § 11-1302 (1951); IOWA CODE § 610.15 (1946); KAN. GEN. STAT. ANN. § 7-106 (1963); NEB. REV. STAT. ch. 7-106 (1962); N. M. STAT. ANN. ch. 18-1-16 (1941); N.D. REV. CODE tit. 27, § 13-08 (1) (1960); UTAH CODE ANN. tit. 78, § 3-31 (1943).

Most of these laws are worded very generally. For example, California deems it to be the duty of an attorney

to employ, for the purpose of maintaining the causes confided to him such means as consistent

Ryder's contention that this act was within the scope of confidential communication. The court held that the function of a defense attorney is not to act in the best interest of his client where such interests bear no "reasonable relation to the privilege. . . ." "Ryder," said the court, "made himself an active participant in a criminal act, ostensibly wearing the mantle of a loyal advocate, but in reality serving as accessory after the fact."<sup>59</sup> The *Ryder* case, though clearly distinguishable from the problem under scrutiny here, helps to delineate the parameters of the attorney-client privilege.

In *Matter of Hardenbrook*<sup>60</sup> an attorney was disbarred for permitting a criminal trial to continue to a verdict after he knew his client had given perjured testimony.<sup>61</sup> Conversely in *Johns v. Smyth*<sup>62</sup> the defense attorney refused to put his client on the witness stand, submit instructions to the jury,<sup>63</sup> or give closing argument because he had some doubt as to the veracity of his client's statements and his innocence. The court, in reversing the conviction, stated that

[w]hen the defendant was interviewed by his court appointed attorney, the attorney stated that he had reason to doubt the accuracy of the defendant's statement. It was at this time that the attorney's conscience actuated his future conduct. . . .<sup>64</sup>

The opinion<sup>65</sup> was based on the court's strong feeling that an attorney can not be deterred from effectively representing a client by his personal opinion as to the client's guilt.<sup>66</sup>

The notion that an attorney does not have the right to prejudice his client<sup>67</sup> forms part of the

<sup>59</sup> *Id.* at 714.

<sup>60</sup> 135 App. Div. 634, 121 N.Y.S. 250 (1909).

<sup>61</sup> This case rests on the tenuous assumption, by the court, that the attorney should believe his client when told that he would perjure himself.

<sup>62</sup> 176 F. Supp 949 (E.D. Va. 1949).

<sup>63</sup> If the attorney had believed his client or had acted in that manner, he would have submitted a jury instruction that if the jury believed the defendant they could find him guilty of the lesser charge of manslaughter. *Id.* at 952.

<sup>64</sup> *Id.* at 953.

<sup>65</sup> *Id.* at 954.

<sup>66</sup> The court in this case was motivated by the dictates of the Canons of Professional Ethics. It referred to Canon 5 in support of its holding. That Canon states, in part: "It is the right of the lawyer to undertake the defense of a person accused of a crime, regardless of his personal opinion as to the guilt of the accused. . . ." *Id.* at 952.

<sup>67</sup> Freedman, *supra* note 5, at 1471 (emphasis added):

The adversary system has further ramifications in a criminal case. The defendant is presumed to be

basis for Freedman's position.<sup>68</sup> It is his contention that an accused may confess for many reasons other than guilt.<sup>69</sup> Thus, to deny a client full representation before the court adjudicates his guilt or innocence would, in Freedman's view, be antagonistic to the legal process.<sup>70</sup>

[I]t will be a dark day in the history of our judicial system if a conviction is permitted to stand where an attorney furnished to an indigent defendant candidly admits his con-

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innocent. The burden is on the prosecution to prove beyond a reasonable doubt that the defendant is guilty. The plea of not guilty does not necessarily mean "not guilty in fact," for the defendant may mean "not legally guilty." Even the accused who knows that he committed the crime is entitled to put the government to its proof. Indeed, the accused who knows that he is guilty has an absolute constitutional right to remain silent. *Escobedo v. Illinois*, 378 U.S. 478, 485, 491 (1964). The moralist might quite reasonably understand this to mean that, under these circumstances, the defendant and his lawyer are privileged to lie to the court in pleading not guilty. In my judgment the moralist is right. However, our adversary system and related notions of the proper administration of criminal justice sanction the lie.

<sup>68</sup> Freedman, *supra* note 5, at 1471.

<sup>69</sup> *Id.* at 1472.

<sup>70</sup> See *supra* note 7.

Recent Supreme Court decisions, assuring the rights of the defendant, may ultimately lead to resolution of the issue in favor of the defendant. Though *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966), concern the right of the defendant *not* to testify, they are analogous to this situation where the right to testify is at issue. These cases restrain the prosecution in its efforts to obtain a confession from the defendant. The Court has reversed other cases where the prosecution has knowingly allowed perjured testimony to be given by its witnesses. *Alcorta v. Texas*, 355 U.S. 28 (1957), *Napue v. Illinois*, 360 U.S. 264 (1959). This is considered a violation of due process. *Alcorta v. Tex.*, *supra* at 31. *Mooney v. Holohan*, 294 U.S. 103 (1935) held the constitutional requirement of due process was not satisfied where the prosecution knew testimony was false.

While these cases limit the prosecution's efforts, the Court has not explicitly made the prohibition against the knowing admission of perjured testimony applicable to the defense. But John Noonan contends:

If the government prosecutor cannot present a doubtful witness without calling the defendant's attention to his lack of credibility, the defendant may be asked to observe the same standard.

Noonan, *The Purposes of Advocacy and the Limits of Confidentiality* 64, *MICH. L. REV.* 1485, 1490-91 (1966).

*In re Sawyer's Petition*, 229 F.2d 805 (1956), held that the intention to commit perjury destroyed the attorney client privilege. *But see, note 7 supra.*

Chief Justice Burger is also in accord with Noonan. Burger, *supra* note 14.

science prevented him from effectively representing his client. . . .<sup>71</sup>

After examination of the writings of legal scholars, the Canons of Ethics, the statutes, and the case law the defense attorney would still be unable to discern, clearly, his proper response when confronted with a client who informs him of an intent to commit perjury in his own defense. It is this ambivalence on this issue that has prompted the following study.

The purpose of the study is to determine the views of practitioners, in the belief that the opinions of the practicing bar are relevant to the formulation of the ethical standards those attorneys are obliged to follow.

### THE STUDY

The information for the study came from two separate groups. The first contained a cross-section sampling of one hundred and one (101) attorneys drawn from the total attorney population of the city of Chicago.<sup>72</sup> This group will be referred to as the Random Sample. The second group consisted of twenty-four (24) attorneys on the Committee of Professional Ethics of the Chicago Bar Association, herein referred to as the Ethics Group.<sup>73</sup>

The Random Sample was composed of two sub-

<sup>71</sup> *Johns v. Smyth*, 176 F. Supp. 949, 954 (E.D. Va. 1949).

<sup>72</sup> The sampling technique used in this survey was only intended to reflect the opinions of Chicago attorneys, which are not necessarily those of the national legal community.

<sup>73</sup> AMERICAN BAR ASSOC., OPINIONS ON PROFESSIONAL ETHICS 3 (1967), Functions of Comm. on Professional Ethics.

1. Formulate and recommend standards of ethics and conduct in the practice of law as a profession; consider the Canons of Ethics of the legal profession and of judicial officers; and make recommendations for amendments to or clarifications of the Canons of Ethics when they may appear to be advisable.

2. Upon request, advise or assist state and local bar associations in their activities in respect to the interpretation of the Canons of Ethics; and furnish information and make recommendations thereon to the House of Delegates or the Board of Governors.

3. Be authorized, when consulted by any member of the bar or by any officer or committee of a state or local bar association, to express its opinion concerning proper professional or judicial conduct, but these opinions shall not deal with questions of judicial decision or judicial discretion, and shall not be given until submitted to the members of the Committee and approved by a majority thereof.

4. Be authorized to adopt such rules as it may deem desirable concerning the methods and procedure to be used in expressing opinions; such rules not to become effective until approved by the Board of Governors. The rules may be altered or abrogated by the House of Delegates.

groups. The first contained fifty-eight lawyers who were solo practitioners or members of firms consisting of four or fewer partners, herein referred to as "smaller firm" attorneys. The remaining subgroup consisting of forty-three lawyers were affiliated with firms of five or more attorneys, herein referred to as "larger firm" attorneys.

All attorneys participating in the study were presented with the following hypothetical situation:

Lawyer X's client has been indicted on a charge of armed robbery. He tells X that he committed the act, but that he will only plead guilty in return for a promise of a lenient sentence. However, the case goes to trial since a deal could not be made. During the course of the trial, X lets his client take the witness stand to deny his guilt.

They were then asked if they approved or disapproved of X's action. Attorneys in the Random Sample were also asked whether they had ever encountered such a situation. Those responding affirmatively were requested to relate what they had done. The others were asked what their response would be in a similar situation.

### FINDINGS

Attitudes in the Random Sample<sup>74</sup> were significantly related to firm size. A plurality of smaller firm lawyers approved of the situation while a substantial majority of the larger firm attorneys disapproved.<sup>75</sup> For smaller firm attorneys, loyalty

<sup>74</sup> The results of the Random Sample segment of the study disclosed 58% of the lawyers disapproved of the situation, 35% approved, and 8% were undecided. Percentages are rounded to the next highest whole number.

The numerical results of the Random Sample part of the study are as follows:

TABLE I  
ATTITUDES OF THE RANDOM SAMPLE TOWARD A  
LAWYER PUTTING A CRIMINALLY ACCUSED CLIENT  
ON THE WITNESS STAND TO COMMIT PERJURY  
Part 1: By Firm Size

Responses	(%) Small Firms	(%) Large Firms
Approve	52	12
Disapprove	40	81
Undecided	8	7
Total	100	100

Note: Fifty-eight attorneys were classified as small firm attorneys; Forty-three were from larger firms.

<sup>75</sup> These results were supported by lawyers' replies to another interview question: "What would you con-

to the client may take precedence over loyalty to the court; the responses of partners and associates from the larger firms indicated a closer allegiance to the court than to the client. This difference in attitude may stem from the fact that attorneys from larger firms generally practice more often in the federal courts, where the environment reinforces respect and loyalty for the court, while attorneys from smaller firms are more likely to practice before local courts which are less likely to instill such sentiments.<sup>76</sup>

Answers approving X's conduct in the hypothetical were more prevalent among those attorneys who regularly engaged in litigation.<sup>77</sup> Lawyers with considerable trial experience perhaps are more sympathetic with the attorney confronted with such a predicament because they are able to identify with the practical consequences of the alternative courses of conduct.

Interestingly, the members of the Ethics Group were collectively unable to provide a definitive response to the hypothetical.<sup>78</sup> In contrast to the Random Sample, the smaller firm members of the Ethics Group tended to disapprove while their counterparts from the larger firms were evenly split.<sup>79</sup> The attitudes were more closely related, however, to trial activity, with trial attorneys approving more than non-litigators.<sup>80</sup> In addition, the older members of the Ethics Group were more

sider to be the worst thing a lawyer can do?" 93% of the small firm attorneys answered exploitation of the client was the worst act a lawyer could undertake. Only 76% of the large firm lawyers agreed with this. In turn, 21% of the large firm attorneys felt the perpetration of fraud was the most deprecable conduct, while only 11% of the small firm representatives gave that answer.

<sup>76</sup> CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 84-95* (1966).

<sup>77</sup>

TABLE II

PERCENTAGE OF LAWYERS IN THE RANDOM SAMPLE WHO DISAPPROVED OF THE SITUATION BY AMOUNT OF TRIAL WORK, CONTROLLING FOR SIZE OF FIRM

Amount of Trial Work	Firm Size	
	Smaller	Larger
Little or None	57 (28)*	91 (24)*
Some or Much	36 (25)*	81 (16)*

\* Undecided cases excluded.

<sup>78</sup> Forty-six per cent disapproved, forty-one per cent approved, and thirteen per cent were undecided.

<sup>79</sup> Compare Table I *supra* note 74 and Table III *supra* note 77.

<sup>80</sup> *Id.*

likely to approve the presentation of the perjured testimony in the context of the hypothetical than the newer members who had served for less than three years.<sup>81</sup>

The reasons offered for approval or disapproval of X's conduct in the problem conform closely to the arguments presented by Freedman<sup>82</sup> and Chief Justice Burger<sup>83</sup> as support for their respective positions. Lawyers who disapproved thought that the attorney was assisting in the perpetration of perjury unless he pursued an approach in the direct examination which he thought would avoid the presentation of false testimony. They also generally agreed that counsel should withdraw if the perjurious conduct was unavoidable.

Those who approved felt that the lawyer should use all available means to secure a favorable judgment for his client, agreeing with Freedman<sup>84</sup> that it was the prosecution's burden to establish guilt beyond a reasonable doubt. Several respondents remarked that the lawyer should not be the judge of his client's guilt or innocence, and they deplored the notion that the attorney should withdraw when confronted with a client who intends to offer perjurious testimony.

It would be misleading not to note the sizeable proportion of responding lawyers who were unable to determine their position on the hypothetical.<sup>85</sup> The following response exemplifies the ambivalence that some attorneys expressed.

You can tell him that he is perjuring himself. In a sense you'd be an accessory to perjury. On the other hand, a defendant is innocent until proven guilty. It's almost a lawyer's duty to withdraw from the case, but the court won't let a lawyer withdraw. I'd want to get out of it.

The equivocation is understandable in terms of the conflicting obligations that the legal system has imposed on the practicing attorney.<sup>86</sup> In addition, it is probably complicated by the fact that only five per cent of the participants in the study had ever confronted this ethical dilemma.<sup>87</sup> In light of the fact that only nine per cent of the

<sup>81</sup> *Id.*

<sup>82</sup> See p. 1 *supra*.

<sup>83</sup> See p. 2 *supra*.

<sup>84</sup> Freedman, *supra* note 5, at 1471, 1477.

<sup>85</sup> Eight per cent of the Random Sample and 13% of the Ethics Group were undecided as to the question of the ethical correctness of an attorney placing his client on the stand, believing he will commit perjury.

<sup>86</sup> See p. 3 *supra*.

<sup>87</sup> This may be too small a sample to be statistically significant.

respondents had ever been involved in criminal cases<sup>88</sup> the five per cent proportion becomes relatively important. It would appear to be a reasonable inference that the issue under scrutiny confronts many who engage in criminal defense work. It is relevant, therefore, to focus on those attorneys who have actually experienced the dilemma of a client informing them of an intent to commit perjury.<sup>89</sup>

As with Freedman, these lawyers interpret the legal system in a manner that allows, and even requires, that the client be allowed to testify perjurally if it will aid the defense.<sup>90</sup> One chose, however, to draw the line at that point:

There are three or four a year like this. Yes, you draw a line. The client can lie but he cannot expect me to get witnesses to support his alibi. The jury knows that a man will do anything to save himself. It's more important to control the witnesses.

Regardless of the dictates of the legal profession, these attorneys felt a moral duty to litigate each case to the extent of allowing the client to perjure himself if it would be tactically appropriate.<sup>91</sup> One respondent stated:

I prefer to be a defendant's lawyer. People don't do immoral things for nothing. They do it because they have to. I don't care what people do—I am tolerant. I never handled a criminal case where the client wasn't guilty. Every judge should sit in jail for a day and see how it is before they sentence a person. . . . [T]he poor get it in the neck.

<sup>88</sup> The incidence is not insignificant in this study. However, the validity of the sampling technique is subject to the survey's geographical limitations and may not reflect properly a national trend that the perjury problem is prevalent.

<sup>89</sup> While other participants in the study could only theorize, analysis of the men who have encountered the client who told them he would perjure himself provides some concrete data to evaluate in a study dealing with the reactions of the practicing bar. Again, the size of the sample casts doubt on the applicability of these answers on any wide basis.

<sup>90</sup> See p. 1 *supra*.

<sup>91</sup> Freedman allows the client to dictate whether he will perjure himself.

Of course, before the client testifies perjurally, the lawyer has a duty to attempt to dissuade him on grounds of both law and morality. In addition, the client should be impressed with the fact that his untruthful alibi is tactically dangerous. . . . However, . . . the final decision must necessarily be the client's.

Freedman *supra* note 5, at 1478.

## CONCLUSION

The private opinions of the attorneys questioned, including those in the Ethics Group, clearly reflect the divergent viewpoints of the legal scholars discussed earlier.<sup>92</sup> As the examination of the study indicates, those closer to criminal defense work were more likely to subscribe to the Freedman view. The majority of those questioned, however, would censure the conduct,<sup>93</sup> but even this is inconclusive of the ethical problem.

It would be misleading to think that disapproval of this situation merely stems from the interpretation of it as fraudulent, for, as Freedman points out, attorneys in other areas of the law freely engage in deceptive conduct.<sup>94</sup> This view is substantiated in a study conducted by Carlin.<sup>95</sup> He observed that lawyers were still considered to be within the bounds of ethical propriety by their peers if they encouraged an elderly client to develop evidence to show that a gift to children was *inter vivos* rather than in contemplation of death, even though the client had suffered a serious heart attack recently.<sup>96</sup> The negative attitude toward the defense attorney's ethical dilemma appears to be influenced more by the fact that it is within the confines of criminal law rather than by the lofty concepts of ethics and morality.<sup>97</sup>

Whether the defendant has a right to have the jury determine the validity of his testimony without intervention of the defense attorney, in the last analysis, remains unanswered. This paper has attempted to set forth the premises that underly each position; hopefully this will assist the defense

<sup>92</sup> See pp. 1-5 *supra*.

<sup>93</sup> See note 13 *supra*. The Committee on Admissions and Grievances of the United States District Court for the District of Columbia stated, with the court's approval, that if an attorney were to do in a court what Freedman suggested in his paper, he would be guilty of professional misconduct. Washington Post, May 15, 1966, at 1, col. 6.

<sup>94</sup> Freedman, *supra* note 5, at 1473-74.

<sup>95</sup> CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR, (1966).

<sup>96</sup> *Id.* at 46.

<sup>97</sup> In another study, a similar expression of disdain for criminal lawyers was evident. See Wood, *Professional Ethics Among Criminal Lawyers*, 7 SOC. PROB. 70 (1959). Even the greatest criminal advocates have been criticized as being unethical and disreputable. Wendell Phillips, the abolitionist, once referred to Rufus Choate, a renowned Boston trial lawyer, as "the man who made it safe to murder, and whose health, thieves asked before they began to steal." FUESS, RUFUS CHOATE: WIZARD OF THE LAW 141 (1928). Clarence Darrow had to hide from a bribery charge brought against him when he represented a labor leader, Tom Mooney, accused of murder.

attorney in choosing which course to follow. In addition, it serves notice that the Canons of Ethics are probably inadequate in this circumstance and should be re-examined, considering the possibility that one set of ethical guidelines for criminal and civil attorneys may be impractical.

It is possible that the issue may be resolved in the courts. The convicted defendant, whose at-

torney has divulged to the trial judge a confession of guilt and an intent to deny it on the witness stand, may be able to raise a viable Fifth and Sixth amendment issue on appeal.<sup>98</sup> In light of the conflicting opinions of legal scholars and practitioners, perhaps this is the only manner in which a definitive resolution of the dilemma will be reached.

<sup>98</sup> See *supra* note 70.